

Cargill Redwood City Salt Ponds Outline for Jurisdiction under Section 10 Rivers and Harbors Act (RHA) and Section 404 Clean Water Act (CWA)

I. Basis for section 10 of the Rivers and Harbor Act (section 10) jurisdiction:

1. Under section 10, "navigable waters of the United States" means "all places covered by the ebb and flow of the tide to the MHW in its unobstructed, natural state." United States v. Milner, 583 F.3d 1174 (9th Cir. 2009) (Milner); Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978) (Froehlke); see also 33 C.F.R. §§ 322.2(a), 329.4, and 329.12(a)(2)
2. The Ninth Circuit in Froehlke noted that in its natural condition, Leslie Salt's 35,000 acres of property along the shores of south San Francisco Bay was marshland subject to the ebb and flow of the tide.
3. Beginning in 1860, the land was diked and used primarily for salt production by means of solar evaporation, and because of the dikes, the former tidal marshlands have not been subject to tidal action. See Froehlke. Beginning in the early 1900's, dikes for salt production were built at the Redwood City site.
4. In Froehlke, the holding that the MHW line is to be fixed in accordance with its unobstructed, natural state was dictated by principle recognized in Willink v. United States, 240 U.S. 572, 36 S.Ct. 422 (1916) (Willink) that one who develops areas below MHW line does so at his peril.
5. Since 1972, the District has exerted jurisdiction over areas behind dikes if all of the following criteria are met: 1) area is presently at or below MHW; 2) area was historically at or below MHW in its "unobstructed, natural state" (i.e., the area was at or below MHW before the dikes were built); and 3) there is no evidence (elevation data) that the area was ever above MHW. 1983 Regulatory Functions Bulletin/Memorandum, Regulatory Function's Policy on section 10 Jurisdiction Behind Dikes (Levees). See also Declaration of Calvin Fong in Support of Defendant's Cross-Motion for Partial Summary Judgment and In Opposition to Plaintiff's Motion for Summary Judgment, Cargill, Inc. v. Shannon, No. C92-20756-RMW (PVT), N.D. Cal. 1993 (Shannon) (Fong Declaration).
6. The District's long-standing policy is based upon historic section 10 waters, which involves the unfilled area which was once below the MHW line and subject to the ebb and flow of the tides, but is now cut off from tidal action by levees. Fong Declaration.

7. Under 33 C.F.R. § 329.4, a determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity. See also United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940).
8. "Later actions" have been interpreted by the District to include diking of the shallow shorelands of San Francisco Bay. Fong Declaration.
9. T-sheets and USGS survey maps (Nichols and Wright study in Fong Declaration) from the 1850's depict tidal areas including the network of tidal channels, sloughs, that are relatively stable features of functioning tidal marshes. In present day marshes, these unvegetated slough beds, referred to as double-sided sloughs, are below plane of MHW, and thus the District has maintained that this was case when the T-sheets were drawn. Fong Declaration.
10. T-sheets overlain on modern USGS maps reconciled original shoreline and tidal sloughs with modern landmarks, with sloughs below plane of MHW, and are thus historic section 10 RHA jurisdictional waters. Fong Declaration.
11. ~~12~~. Evidence of navigability is further demonstrated by dredging operations of The Mallard, discussed in detail below.
12. District's position on section 10 RHA jurisdiction remained unchanged.

II. Basis for 404 CWA Jurisdiction

1. The Corps jurisdiction under the CWA extends at least to waters which are no longer subject to tidal inundation because of Leslie's dikes without regard to the location of historic tidal water lines in their unobstructed, natural state. Milner, Froehle.
2. If land was dry upland at the time the CWA was enacted, it will not be considered part of the waters of the United States (U.S.) unless waters actually overtake the land, even if at one point it had been submerged before the CWA was enacted or if there have been subsequent lawful improvements to the land in its dry state. Milner.
3. An obstruction, if in place prior to the enactment of the CWA, must have been lawfully built on dry land beyond the reach of the high tide line. Milner.
4. The District exerted jurisdiction over Cargill's interior, in-board salt ponds in its application before the court in Shannon on the basis of 1) interstate

commerce waters, § a(3); and 2) impoundments of waters of the U.S., § a(4).
Fong Declaration.

5. The extent of 404 jurisdiction was the OHWM observed in the salt ponds.
Fong Declaration.
6. Cargill has never filled in the salt ponds to create dry, solid, uplands, and therefore the ponds are not fast lands. Milner, Froehlke, United States v. Stoeco Homes, Inc., 498 F.2d 597 (3rd Cir. 1974) (Stoeco).
7. The District continues to maintain that because the dikes were constructed on land below the HTL, the historic tidal waters in their unobstructed, natural state include the salt ponds behind the dikes to the OHWM. Milner, Froehlke.
8. It has been documented in the record that a floating dike repair vessel, The Mallard, owned by Cargill, has repaired dikes on the inboard side of the bittern ponds (i.e., behind the dikes). The Mallard uses a very simple lock system, breaching an outer dike, navigating the breach, sealing the breach behind it, and then breaching a second dike, allowing it to repair the dike from the in-board side of the levee, by scooping bay mud from the bottom of the pond and depositing it on the dike. Thus, The Mallard's navigation of the salt pond demonstrates that the lands on the in-board side of the dikes, i.e., or behind the dikes, are not dry, solid upland under the natural, unobstructed test of Froehlke and Milner.
9. The District's position on 404 jurisdiction remained unchanged.

III. Surrender/Estoppel

1. Stoeco held that marsh land filled in to form firm land suitable for residential development created "fast land." Therefore, [delete 1] the federal government surrendered its navigational servitude in that instance.
2. In Froehlke, claims based on equitable considerations, estoppels, or surrender, were not adjudicated.
3. Froehlke's "holding that the MHW line is fixed in accordance with its natural, unobstructed state is dictated by the principle recognized in Willink, supra, that one who develops areas below the MHW line does so at his peril." The Ninth Circuit in Froehlke recognized "that under this holding the Government's power may be surrendered or its exercise

estopped, and if so, under what circumstances and to what extent, may arise.”¹ “Leslie, for example, may contend that there has been a surrender by the Corps of its power under the Rivers and Harbors Act with respect to certain land below the MHW line”, but this was not argued in Froehlke.

4. Milner also recognized the Willink principle that one who develops below the MHW does so at his peril.
5. In footnote 13 of Milner, the court stated “As in Leslie, we express no opinion as to whether or at what point the government may be estopped from asserting its jurisdiction because land has long ago been filled, as was the case in United States v. Stoeco Homes.”
6. The District continues to maintain that the salt ponds have not been filled in above the HTL, as evidenced by OHWM in the salt ponds, and therefore has not surrendered 404/Section 10 jurisdiction under the fast lands theory. Milner, Froehlke, Stoeco, Willink.
7. Current tidal datum analysis being conducted by the District and Cold Regions Research and Engineering Laboratory will establish with greater scientific certainty the location of the HTL and MHW line.
8. In addition, under the 1940 Section 10 permit issued to Stauffer Chemical Company, the “earth dyke or levee” can be removed by due notice of the ‘Secretary of War.’
9. Furthermore, as discussed above, The Mallard’s navigation of the bittern ponds is further evidence that the salt ponds are not “fast lands”.
10. The District’s position on surrender/estoppels remained unchanged.